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(The Supreme Court)

II] REPORTS [1976

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction).

PRESENT:—*Y. V. Chandrachud, R. S. Sarkaria and A. C. Gupta, JJ.*

Commissioner of Income-tax, Madras .. *Appellant**

v

T. V. Sundaram Iyengar and Sons (P.) Ltd., Madurai .. *Respondent.*

(A) *Indian Income-tax Act* (*XI* of 1922), *section* 23-*A*, *Explanation* 2—*Undistributed profits—Company having composite business—Levy of additional super-tax—Calculation of statutory percentage—Apportionment of dividends—Interpretation—Taxing statutes—Penal provisions*

(B) *Words and Phrases*—" *Similarly apportioned* ".

Where a company has a composite business, as for example industrial and non-industrial business, the first step is to ascertain the distributable profits of the two parts separately. For the purpose of finding out the minimum dividend that the company ought to have distributed, the proper statutory percentage as prescribed by *Explanation* 2 to section 23-A of the Indian Income-tax Act, 1922, has to be applied separately to the distributable profits of the two parts, as if the respective profits are the total income of the company in relation to each part of its business. The composite dividend distributed by the company has then to be apportioned between the two parts in the same ratio as the respective profits of the two parts bear to the total profits of the company. If the dividends have to be apportioned in the ratio of profits of the two segments, the taxes have also to be similarly apportioned for *Explanation* 2 speaks of " the amount of dividends and taxes also being similarly apportioned." The method specified in section 23-A has to be worked out according to its scheme and it is no answer to the obligation to apportion the dividends and taxes, that taxes levied on the profits of the two segments are unequal or are leviable on a different basis. [*Paras.* 19 *and* 20.]

Explanation 2 to section 23-A indicates with meticulous particularity, how similarly dividends and taxes must be apportioned. When it says that they must be " similarly apportioned ", the reference obviously is to the apportionment which is spoken of earlier in the *Explanation*. After specifying what particular percentages shall constitute the statutory percentage for the purposes of section 23-A, *Explanation* 2 provides that the said percentages shall be applied separately "with reference to the amounts of profits and gains attributable to the two parts of the company's business." The words " similarly apportioned" which thereafter occur in the *Explanation* mean apportioned "with reference to the amounts of profits and

*C.As. Nos. 1392 and 1393 of 1970.

9th April, 1975.

gains attributable to the two parts of the company's business." Thus, the *Explanation* first refers to an apportionment or splitting up and then provides that the dividends and taxes shall be similarly apportioned, that is to say, similarly split up. Accordingly, the words "similarly apportioned" convey a definite meaning and are not ambiguous. The word "apportioned" is used in *Explanation* 2 in the sense of "split up", so that "similarly apportioned" means simply "split up". The dividends have therefore to be split up similarly, that is, in the same ratio as the industrial and non-industrial profits bear to each other after the total profit is split up in two parts, industrial and non-industrial. It is thus not open to the company to split up and apportion the dividends to the profits of the two segments in such manner as it finds convenient or thinks fit. The company's freedom to apportion the dividends is conditioned by the ratio which the profits of the two segments bear to the total profits. [*Paras.* 14, 15, 16.]

In considering whether the company is liable to pay additional super-tax on the entire balance of distributable profits, it has to be borne in mind that section 23-A is clearly penal in nature. The burden would lie on the revenue to prove that the conditions laid down by the section are satisfied. Secondly, penal statutes have to be construed strictly in the sense that if there is a reasonable interpretation which will avoid the penalty, that interpretation ought to be adopted. [*Paar.* 23.]

The language of sub-section (1) of section 23-A as also of *Explanation* 2 is clear and distinct and does not yield to more than one reasonable interpretation. Sub-section (1) provides that if the dividends distributed by a company are less than the statutory percentage of the "total income" of the company as reduced by the amounts mentioned in clauses (*a*), (*b*) and (*c*), the Income-tax Officer shall make an order that the company shall be liable to pay additional super-tax at the prescribed rates "on the undistributed balance of the total income of the previous year", that is to say on the total income as reduced by the amounts referred to in clauses (*a*), (*b*) and (*c*) and the dividends actually distributed. *Explanation* 2 clarifies what is meant by "statutory percentage" and provides that the prescribed percentages should be applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business, "as if the said amount were respectively the total income of the company in relation to each of its parts, ... for the purposes of sub-section (1)" The fiction created by the *Explanation* is thus expressly limited to the purpose of sub-section (1) and there is no justification for pursuing the fiction to its logical conclusion so as to permit it to operate beyond the limited purpose of sub-section (1). Under the scheme contained in section 23-A, where a company has a composite business it is necessary at the outset to find out the profits attributable to the two parts of its business. The statutory percentages as prescribed by *Explanation* 2 have then to be applied separately to the profits of the two parts. By reason of the fiction created by *Explanation* 2 the profits of each part have for this purpose and this purpose, alone, to be treated as if they were the total income of that part of the company's business. By sub-section (1) the company becomes liable to pay additional super-tax if the dividends distributed by it are "less than the statutory percentages of the tota income." *Explanation* 2 creates the fiction that for the purposes of sub-section (1) the income of the respective parts is to be regarded as the total income of each part so that the statutory percentages can be

applied separately to the income of each part. The fiction operates in this limited field and is in terms created for this limited purpose. [*Para.* 25.]

The levy of additional super-tax under section 23-A (1) is a single levy. The super-tax has to be levied "on the undistributed balance of the total income of the previous year." Sub-section (1) itself clarifies that by these words is meant "total income as reduced by the amounts, if any, referred to in clause (*a*), clause (*b*) or clause (*c*) and the dividends actually distibuted, if any." The additional super-tax has therefore to be levied on the entire undistributed balance of the net income of the company. In other words, even if the Income-tax Officer finds that the apportioned dividend in any part of the company's business is less than the dividend that ought to have been declared by application of the statutory percentage, the additional super-tax has to be levied on the whole of the undistributed profits of the company. [*Para.* 26.]

Cases referred to :

Sir Kasturchand Ltd. v. *Commissioner of Income-tax, Bombay City*, 51 Bom.L.R. 687: 17 I.T.R. 493 : A.I.R. 1950 Bom. 1; *Commissioner of Income-tax, West Bengal* v. *Gangadhar Banerjee & Co. (P.) Ltd.*, (1965) 2 I.T.J. 339 : (1965) 2 Comp.L.J. 113 : 57 I.T.R. 176 : (1965) 2 S.C.J. 425 : A.I.R. 1965 S.C. 1977; *Willis* v. *Thorp*, (1875) 10 Q.B. 383.

Appeals by certificates from the judgment, dated 23rd January, 1969, of the Madras High Court in Tax Cases Nos. 116 of 1965 and 190 of 1967.

D. N. Kharkhanis, Senior Advocate, (*S. P. Nayar*, Advocate, with him), for Appellant.

S. Swaminathan, Senior Advocate (*S. Gopalakrishnan*, Advocate, with him), for Respondent.

The Judgment of the Court was delivered by

Chandrachud, J.—These appeals by certificate granted by the High Court of Madras under section 66-A (2) of the Income-tax Act, 1922 arise out of a common judgment, dated 23rd January, 1969 delivered by the High Court in Tax Cases Nos. 116 of 1965 and 190 of 1967. Tax Case No. 116 of 1965, arose out of the reference made by the Income-tax Appellate Tribunal under section 66 (1) of the Act while Tax Case No. 190 of 1967, arose out of a reference made by the Tribunal in pursuance of an order made by the High Court under section 66 (2) of the Act. The question which arises for consideration in these appeals is whether under section 23-A of the Act, the assessee-company is liable to pay additional super-tax in respect of any portion of its profits.

2. Section 23-A of the Act of 1922, in so far as material read thus at the relevant time:

> "23-A. (1) Where the Income-tax Officer is satisfied that in respect of any previous year the profits and gains distributed as dividends by any company within the twelve months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the company of that previous year as reduced by—
>
> (*a*) the amount of income-tax and super-tax payable by the company in respect of its total income, but excluding the amount of any super-tax payable under this section;
>
> (*b*) the amount of any other tax levied under any law for the time being in force on the company by the Government or by a local authority in excess of the amount, if any, which has been allowed in computing the total income; and

(*c*) in the case of a banking company, the amount actually transferred to a reserve fund under section 17 of the Banking Companies Act, 1949.

The Income-tax Officer shall, unless he is satisfied that, having regard to the losses incurred by the company in earlier years or to the smallness of the profits made in the previous year, the payment of a dividend or a larger dividend than that declared would be unreasonable, make an order in writing that the company shall, apart from the sum determined as payable by it on the basis of the assessment under section 23, be liable to pay super-tax at the rate of fifty per cent. in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments, and at the rate of thirty-seven per cent. in the case of any other company on the undistributed balance of the total income of the previous year, that is to say, on the total income as reduced by the amounts, if any, referred to in clause (*a*), clause (*b*), or clause (*c*) and the dividends actually distributed, if any.

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Explanation 2.—For the purposes of this section, statutory percentage means,—

(*i*) in the case of a company whose business consists wholly or mainly in the dealing in or holding of investments .. 100%

(*ii*) in the case of an Indian company whose business consists wholly in the manufacture or processing of goods or in mining or in the generation or distribution of electricity or any other form of power .. 45%

(*iii*) in the case of an Indian company, a part only of whose business consists in any of the activities specified in clause (*ii*)—

(*a*) in relation to the said part of the company's business .. 45%

(*b*) in relation to the remaining part of the company's business—

(1) if it is a company which satisfies the conditions specified in sub-clause (*a*) of clause (*iv*) .. 90%

(2) in any other case .. 60%

the said percentages being applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business aforesaid as if the said amounts were respectively the total income of the company in relation to each of its parts, the amount of dividends and taxes, also being similarly apportioned, for the purposes of sub-section (1).

* * * *"

3. For the assessment year 1957-58 relevant to the previous year ended 31st December, 1956 the company was assessed to additional super-tax under the aforesaid provision. The business of the company consists partly in the manufacture or processing of goods and partly of an activity of a non-industrial nature. Out of a total income of Rs. 37,98,774 the profits of the company available for distribution came to Rs. 17,41,814 out of which Rs. 3,36,504 represented industrial profits and Rs. 14,05,310 represented non-industrial profits. The company distributed by way of dividends a sum of Rs. 4,20,640 only, claiming that the dividend was declared equally out of the profits of the industrial and non-industrial activities. Thus, the profits which were available for distribution but which were not distributed came to Rs. 13,21,174.

4. The Income-tax Officer, while making the assessment allocated the dividends declared by the company to the industrial and non-industrial segments in the same proportion as the profits of the two segments bore to the total profits of the company. By this method, out of the total dividend of Rs. 4,20,640 declared by the company, a sum of Rs. 81,264 was treated as dividends declared out of industrial profits while a sum of Rs. 3,39,376 was treated as dividends declared out of non-industrial profits. Holding that under section 23-A, the company was liable to distribute by way of dividends a sum of Rs. 1,51,426 out of industrial profits and a sum of Rs. 8,43,186 out of non-industrial profits, the Income-tax Officer levied additional super-tax on the entirety of the undistributed balance of the total income, that is to say on Rs. 13,21,174.

5. The Appellate Assistant Commissioner having rejected the appeal, the company carried the matter in a further appeal to the Income-tax Appellate Tribunal, Madras Bench, contending that it had declared dividends utilising the industrial and non-industrial profits equally and since the dividends thus declared out of industrial profits exceeded the statutory percentage of the minimum distributable dividend as provided in section 23-A, the levy of additional super-tax on the industrial profits was unjustified. On the other hand, it was submitted on behalf of the Department that the dividends actually declared had, for the purposes of section 23-A, to be apportioned in the same ratio in which the profits themselves were apportioned between industrial and non-industrial activities. The Tribunal rejected the method canvassed by the Department as "a rule of thumb" but then it also rejected the method adopted by the company of allocating the declared dividend half and half to the profits of the two segments. Having rejected both the methods, the Tribunal held that in so far as profits of the industrial activity were concerned, the company must be deemed to have distributed by way of dividends out of those profits just so much, neither more nor less, as would be equal to 45% of such profits. Accordingly, the Tribunal allocated a sum of Rs. 1,51,426 as dividends out of industrial profits and the balance, namely, Rs. 2,69,214 as dividends out of non-industrial profits. On this allocation the Tribunal came to the conclusion that the company, having declared the statutory dividend on its industrial profits, was not liable to pay additional super-tax in so far as those profits were concerned. It, however, upheld the levy of additional super-tax on non-industrial profits.

6. Under section 66 (1) of the Act, the Tribunal referred the following question for the opinion of the High Court:

> "(1) Whether on the facts and in the circumstances of the case, the Tribunal was right in holding that the assessee-company was not liable to the additional super-tax, under section 23-A in respect of the assessee's industrial profits for the assessment year 1957-58."

7. Under section 66 (2) of the Act the Tribunal referred to the High Court the following question:

> "(2) Whether on the facts and in the circumstances of the case, the Tribunal is right in holding that additional super-tax is not leviable under section 23-A of the Act, in respect of any portion of the profits of the assessee-company for the assessment year 1957-58".

8. The second question on which the High Court called for a reference may

seem to suggest that under the judgment of the Tribunal the company was held not liable to pay additional super-tax in respect of any portion of its profits. That is not so. The Tribunal held that the company was not liable to pay additional super-tax on its industrial profits but was liable to pay it on non-industrial profits.

9. The High Court confirmed the Tribunal's view. It held that there was no justification in *Explanation* 2 for the apportionment of dividends in the ratio which the industrial profits bear to non-industrial profits, that it was open to the assessee to apportion the dividends in such a way as to conform to the requirements of section 23-A in respect of one of the two segments of its business and that the profits of the other segment only would attract the incidence of additional super-tax. The High Court demonstrated the absurdity of the contrary view with the help of a hypothetical illustration.

10. We are concerned in this appeal with the true construction of section 23-A as re-cast by Finance Act II of 1967. The section, in so far as relevant, is extracted above. It has no application to companies in which the public are substantially interested. The section provides for levy of additional super-tax at 50 per cent. in the case of a company whose business consists wholy or mainly in the dealing in or holding of investments and at 37 per cent. in the case of any other company. The additional super-tax is leviable if in respect of any previous year the profits and gains distributed as dividends within the 12 months immediately following the expiry of that previous year are less than the statutory percentage of the total income of the previous year as reduced by the amounts mentioned in clauses (*a*), (*b*) and (*c*) of sub-section (1). The additional super-tax, which in the instant case would be 37 per cent. is payable on the undistributed balance of the total income of the previous year. By "undistributed balance of the total income" is meant the total income as reduced by the amounts, if any, referred to in clauses (*a*), (*b*) and (*c*) of sub section (1) and the dividends actually distributed, if any.

11. By *Explanation* 2, "statutory percentage" means for the present purpose, 45 per cent. of industrial profits and 60 per cent. of non-industrial profits. These percentages have to be applied separately to the profits of the two segments as if those profits were respectively the total income of the company in relation to each segment of its business. The dividends and taxes have also to be "similarly apportioned", for the purposes of sub-section (1).

12. Two questions arise for decision: (1) Whether the dividends distributed by the company have to be apportioned as between the profits of the industrial and non-industrial segments of its business in the same proportion as the respective profits bear to the total profits of the company; and (2) whether, if on apportionment, the dividend apportionable to one of the two segments is found to be less than the statutory percentage in respect of that segment, the additional super-tax is leviable on the entire balance of the company's undistributed profits or whether it is leviable on the balance of undistributed profits of that segment only in respect of which the short-fall has occurred. The second question may not strictly arise if on the first question it is found that the dividend apportionable to the two segments is less than the statutory percentage in respect of both the segments. All the same, it would be necessary to examine that question also as the High

Court has held that the liability to pay the additional super-tax must be restricted to the undistributed profits of that segment only, in respect of which the default has occurred.

13. On the first question, the language of *Explanation* 2 is clear and admits of no doubt or difficulty. It requires by its express terms that for the purposes of sub-section (1), the amount of dividends must be "similarly apportioned". But, counsel for the respondent urged that since the *Explanation* does not refer to any apportionment at all, the words "similarly apportioned" cannot be ascribed any rational meaning and it would therefore be open to the company to apportion the dividends 50:50 to the profits of the two segments. Relying on "Words and Phrases Legally Defined" by Saunders, Vol. V, p. 79 where it is stated that the words "similar" is an ambiguous word, it was submitted that the benefit of an ambiguity in a taxing statute must go to the assessee and accordingly, the company would be free to make a convenient apportionment of dividends so as to attract the least incidence of the additional super-tax. Counsel also relied on Burrow's "Words and Phrases", Vol. I, p. 217, where it is said that so long as the apportionment is made with the desire to act as fairly and justly as possible by all parties, no uniform mode of apportionment is necessary.

14. The word "similar" may be said to be a word of ambiguous import in the sense that the mere stipulation in a statute that something should be done similarly is insufficient by itself to signify the degree of similarity with which that thing must be done. A thing can be done similarly without its being a slavish copy of the model. But *Explanation* 2 indicates with meticulous particularity, how similarly dividends and taxes must be apportioned. When it says that they must be "similarly apportioned", the reference obviously is to the apportionment which is spoken of earlier in the *Explanation*. After specifying what particular percentages shall constitute the statutory percentage for the purposes of section 23-A, *Explanation* 2 provides that the said percentages shall be applied separately "with reference to the amounts of profits and gains attributable to the two parts of the company's business." The words "similarly apportioned" which thereafter occur in the *Explanation* mean apportioned "with reference to the amounts of profits and gains attributable to the two parts of the company's business." Thus, the *Explanation* first refers to an apportionment or splitting up and then provides that the dividends and taxes shall be similarly apportioned, that is to say, similarly split up. Accordingly, the words "similarly apportioned" convey a definite meaning and are not ambiguous.

15. It is urged that the division of total profits of a company into industrial and non-industrial profits cannot be the result of any apportionment properly so-called but must conform to the company's books of account and therefore, *Explanation* 2 cannot be said to refer to any apportionment before speaking of the dividends and taxes being "similarly apportioned". This argument reads too much in the word "apportioned". That word is used in *Explanation* 2 in the sense of "split up", so that "similarly apportioned" means simply "similarly split up". The dividends have therefore to be split up similarly, that is, in the same ratio as the industrial and non-industrial profits bear to each other after the total profit is split up in two parts, industrial and non-industrial. According to Burrow's Words and Phrases, Vol. I, p. 217, to "apportion" means to "split up".

16. It is therefore impossible to accept the respondent's contention that though *Explanation* 2 requires that dividends should be similarly apportioned, it would be open to the company to make any convenient division of the dividends distributed by it. According to the Shorter Oxford English Dictionary, 3rd Edition, Vol. I, p. 87, to "apportion" is "to assign as a proper portion". An assignment as a proper portion of the dividends would mean an assignment in the same or similar ratio as the respective profits of the two segments bear to the total profits of the company. It is thus not open to the company to split up and apportion the dividends to the profits of the two segments in such manner as it finds convenient or thinks fit. The company's freedom to apportion the dividends is conditioned by the ratio which the profits of the two segments bear to the total profits.

17. The total distributable profits of the company came to Rs. 17,41,814 out of which the industrial profits are Rs. 3,36,504 and the non-industrial profits are Rs. 14,05,310. Forty-five per cent. of the industrial profits comes to Rs. 1,51,426 while 60 per cent. of the non-industrial profits comes to Rs. 8,43,186. The company therefore ought to have distributed a sum of Rs. 9,94,612 by way of dividends whereas it distributed a sum of Rs. 4,20,640 only. This sum of Rs. 4,20,640 has to be split up in the same proportion which the respective profits of the two segments bear to the total profits of the company. This is to say, a sum of Rs. 81,264 from out of the total dividends distributed is apportionable to the industrial profits while a sum of Rs. 3,39,376 is apportionable to the non-industrial profits. There is thus a short-fall in respect of both the segments and accordingly the company would be liable to pay the additional super-tax at the rate of 37 per cent. on the entire undistributed balance of distributable profits.

18. The hypothetical illustration which was cited before the Income-tax Officer and which is relied upon by the High Court may at the highest, if its fundamental premise is true, show that the interpretation canvassed by the Revenue may conceivably work out injustice. But if the language of the statute is clear and unambiguous, and if two interpretations are not reasonably possible, it would be wrong to discard the plain meaning of the words used in order to meet a possible injustice. Besides, the illustration only assumes an injustice and therefore its fundamental premise is wrong. The distributable profits of the hypothetical company are said to be Rs. 1,00,000 out of which Rs. 30,000 are industrial and Rs. 70,000 non-industrial profits. Applying the statutory percentage of 45 and 60 per cent. respectively, the company must distribute by way of dividends Rs. 13,500 plus Rs. 42,000, that is, Rs. 55,500. The High Court says that even if the company distributes Rs. 55,500 by way of dividends, apportioning Rs. 13,500 to industrial profits and Rs. 42,000 to non-industrial profits, it would violate section 23-A because, if the sum of Rs. 55,500 is to be apportioned in the same ratio which the profits of the two segments bear, a sum of Rs. 16,650 will be apportionable to industrial profits and Rs. 38,850 to non-industrial profits. The fallacy of this illustration consists in its overlooking that if the company is liable to distribute Rs. 55,500 by way of dividends and it does distribute that sum, there is no violation of section 23-A. That section applies only if the "profits and gains distributed as........dividends are less than the statutory percentage of the total income......as reduced........".

19. If the dividends have to be apportioned in the ratio of profits of the two

segments, the taxes have also to be similarly apportioned for *Explanation* 2 speaks of "the amount of dividends and taxes also being similarly apportioned". A "similar" apportionment of taxes, it is urged by the respondent, may in practice lead to impossible and unreal situations since the taxes on the profits of the two segments may be unequal as in the case of a newly established industrial undertaking which, in respect of its industrial income, may enjoy a tax concession. There is no merit in this contention. The method specified in section 23-A has to be worked out according to its scheme and it is no answer to the obligation to apportion the dividends and taxes, that taxes levied on the profits of the two segments are unequal or are leviable on a different basis.

20. Thus, the High Court and the Tribunal were wrong in holding in favour of the assessee on the first of the two questions which we have framed for consideration. Where a company has a composite business, as for example industrial and non-industrial business, the first step is to ascertain the distributable profits of the two parts separately. For the purpose of finding out the minimum dividend that the company ought to have distributed, the proper statutory percentage as prescribed by *Explanation* 2 has to be applied separately to the distributable profits of the two parts, as if the respective profits are the total income of the company in relation to each part of its business. The composite dividend distributed by the company has then to be apportioned between the two parts in the same ratio as the respective profits of the two parts bear to the total profits of the company.

21. We have shown that in the instant case the dividend apportionable between the two parts of the company's business is less than the statutory percentage in respect of both the parts. The High Court, like the Tribunal, gave to the company the choice to allocate the dividend suitably to the two parts and held on such allocation that since the default had occurred in respect of the profits of the non-industrial part only, the company would be liable to pay the additional super-tax on the undistributed balance of the non-industrial profits only. The second question which we propose to consider, though it does not arise on our findings, is whether the company is liable to pay additional super-tax on the undistributed balance of non-industrial profits only or whether it is liable to pay the additional super-tax on the entire undistributed balance of its distributable profits. We have heard a full argument on this question and if we did not decide it the view of the High Court is likely to cause misunderstanding.

22. As observed by Chagla, C.J., in *Sir Kasturchand Ltd.* v. *Commissioner of Income-tax, Bombay City*[1], section 23-A was enacted *in terrorem* against private companies. The object of the section is to prevent evasion of super-tax by the shareholders of a company in which the public are not substantially interested. The shareholders of a private company could avoid the high incidence of super-tax by allowing the profits of the company to accumulate in its hands so that the accumulated profits could be distributed eventually in the form of bonus shares which are not assessable as income in their hands.

23. In considering whether the company is liable to pay additional super-tax on the entire balance of distributable profits, it has to be borne in mind that section 23-A is clearly penal in nature;

1. 17 I.T.R. 493 at 495 and 496 : 51 Bom. L.R. 687 : A.I.R. 1950 Bom. 1.

for, in the circumstances mentioned therein, if a private company fails to distribute by way of dividends the statutory percentage of its distributable profits, it becomes liable to pay, apart from the sum determined as payable by it on the basis of the assessment under section 23, super-tax at 50 per cent. or 37 per cent. as the case may be, on the undistributed balance of its distributable profits. In the first place, this provision being penal, the burden would lie on the revenue to prove that the conditions laid down by the section are satisfied: *Commissioner of Income-tax, West Bengal* v. *Gangadhar Banerjee & Co. (P.) Ltd.*[1]. Secondly, penal statutes have to be construed strictly in the sense that if there is a reasonable interpretation which will avoid the penalty, that interpretation ought to be adopted: "When the Legislature imposes a penalty, the words imposing it must be clear and distinct." *Willis* v *Thorp*[2], *see also* Craies on Statute Law, Sixth Ed., pp. 529-530. It is contended on behalf of the respondent that the language of section 23-A (1) read with *Explanation* 2 is ambiguous and therefore the Court ought to adopt the interpretation which favours the assessee, more particularly because the relevant provisions provide for the imposition of a penalty. In this behalf, learned counsel for the respondent relied strongly on the provision contained in *Explanation* 2 by which the statutory percentages are required to be applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business, "as if the said amounts were respectively the total income of the company in relation to each of its parts".

24. It is urged that the fiction created by *Explanation* 2 must be given its full effect and that it must be carried to its logical conclusion. As the distributable profits of the two parts are to be deemed to be the total income of the company in relation to each of those parts, the penalty, according to the respondent, can be imposed on that part of the income only in respect of which the default has occurred.

25. It is impossible to accept this contention. If two interpretations of the relevant provisions were reasonably possible, we would have readily accepted that interpretation which favours the assessee. But the language of sub-section (1) of section 23-A as also of *Explanation* 2 is clear and distinct and does not yield to more than one reasonable interpretation. Sub-section (1) provides that if the dividends distributed by a company are less than the statutory percentage of the "total income" of the company as reduced by the amounts mentioned in clauses (*a*), (*b*) and (*c*), the Income-tax Officer shall make an order that the company shall be liable to pay additional super-tax at the prescribed rates "on the undistributed balance of the total income of the previous year", that is to say on the total income as reduced by the amounts referred to in clauses (*a*), (*b*) and (*c*) and the dividends actually distributed. *Explanation* 2 clarifies what is meant by "statutory percentage" and provides that the prescribed percentages should be applied separately with reference to the amounts of profits and gains attributable to the two parts of the company's business, "as if the said amounts were respectively the total income of the company in relation to each of its parts,....for the purposes of sub-section (1)". The fiction created by the *Explanation* is thus expressly limited to the purpose of sub-section (1) and there is no justification for pursuing the fiction to its logical conclusion so as to permit it to operate

1. 57 I.T.R. 176, 184 : (1965) 2 I.T.J. 339: (1965) 2 S.C.J. 425: A.I.R. 1965 S.C. 1977.
2. (1875) L.R. 10 Q.B. 383, 386.

beyond the limited purpose of sub-section (1). Under the scheme contained in section 23-A, where a company has a composite business it is necessary at the outset to find out the profits attributable to the two parts of its business. The statutory percentages as prescribed by *Explanation* 2 have then to be applied separately to the profits of the two parts. By reason of the fiction created by *Explanation* 2 the profits of each part have for this purpose, and this purpose alone, to be treated as if they were the total income of that part of the company's business. By sub-section (1) the company becomes liable to pay additional super-tax if the dividends distributed by it are "less than the statutory percentage of the total income". *Explanation* 2 creates the fiction that for the purposes of sub-section (1), the income of the respective parts is to be regarded as the total income of each part so that the statutory percentages can be applied separately to the income of each part. The fiction operates in this limited field and is in terms created for this limited purpose.

26. The levy of additional super-tax under section 23-A (1) is a single levy. The super-tax has to be levied "on the undistributed balance of the total income of the previous year". Sub-section (1) itself clarifies that by these words is meant "total income as reduced by the amounts, if any, referred to in clause (*a*), clause (*b*) or clause (*c*) and the dividends actually distributed, if any". The additional super-tax has therefore to be levied on the entire undistributed balance of the net income of the company. In other words, even if the Income-tax Officer finds that the apportioned dividend in any part of the company's business is less than the dividend that ought to have been declared by application of the statutory percentage, the additional super-tax has to be levied on the whole of the undistributed profits of the company. The High Court was therefore in error in holding that the profits of the two parts of the company's business should be treated as if they were the total income of the company for all purposes. In taking this view the High Court overlooked the concluding words of *Explanation* 2 by reason of which the legal fiction has to be limited to its duly appointed purpose.

27. In the result we set aside the order of the High Court and allow the appeal with costs. Costs shall be in one set.

T.K.K. ——— *Appeals allowed.*

THE SUPREME COURT OF INDIA

(Civil Appellate Jurisdiction)

PRESENT :—*A. N. Ray, CJ., M. H. Beg and Jaswant Singh, JJ.*

State of Tamil Nadu .. *Appellant**

v.

S. Kumaraswami and others .. *Respondents.*

(A) *Civil Procedure Code* (*V of* 1908), *Order* 41, *rule* 23—*Remand—Scope.*

(B) *Suit against the State for declaration of title—Suit decreed—Appeal by State to High Court—Findings called for regarding title and possession—Findings submitted by lower Court—Title and possession found against plaintiff—Appeal dismissed by High Court brushing aside findings—No reasons given—Appeal to Supreme Court—High Court's disposal considered perfunctory—Case remanded to High Court.*

The Subordinate Judge submitted a finding that the respondent-plaintiff had no title and also had no possession. The finding of the learned Subordinate Judge was brushed aside by the High Court without any reason, without any appreciation of documents and without

*C.A. No. 1002 of 1971. 19*th March*, 1976.

any appreciation of the contentions of the parties. The High Court gave a perfunctory judgment.

Held: The High Court failed to exercise the duties as an appellate Court. In the circumstances, the only way to do justice in this matter is to remand it to the High Court. The High Court will hear the matter. [*Paras*. 4 *and* 5]

The Judgment of the Court was delivered by

Ray, CJ.—This appeal is from the judgment dated 17th September, 1969 of the High Court, Madras.

2. The respondent filed this suit against the State for a declaration of title to 849.99 acres of land. The suit was decreed. On appeal the High Court remanded the suit for finding on two issues :

(*a*) whether the respondent plaintiff has title to th suit properties ; and

(*b*) whether the respondent plaintiff has possession of the suit properties.

3. The Subordinate Judge submitted a finding that the respondent plaintiff had no title and also had no possession.

4. The finding of the Subordinate Judge on two matters was brushed aside by the High Court without any reason, without any appreciation of documents and without any appreciation of contentions of the parties. The High Court gave a perfunctory judgment. The High Court failed to exercise the duties as an appellate Court. It is unfortunate that the High Court did so.

5. The only way to do justice in the matter is to remand it to the High Court. The High Court will hear the matter. The Bench which heard this matter earlier will not hear it on remand. We are sorry to make this observation but it is because of the manner in which the Division Bench of the High Court pronounced Judgment in this matter.

6. For the foregoing reasons we order as follows :

(1) The decree dated 17th September, 1969 of the High Court is set aside. The matter is remanded to the High Court for disposal in accordance with law,

(2) The parties will be at liberty to urge their rival contentions on all questions of fact and law.

(3) The findings against the State on all questions including, in particular, title, possession and *res judicata* recorded in the order dated 18th August, 1966 of the High Court are set aside. The State will be at liberty to urge all these pleas and other pleas open to the State;

(4) The parties will be at liberty to support or challenge the findings dated 26th October, 1967, submitted by the Subordinate Judge.

(5) The joint receivers appointed by this Court will forthwith take possession of the entire property and continue to act as joint receivers till the disposal of the matter. The directions given, by this Court earlier, that the respondents would have liberty to enter the land, are recalled and it is made clear that the respondents will have no right whatever to enter the land till disposal of the matter.

7. The joint receivers will make a valuation of the existing standing crops and submit a report of the valuation to the High Court.

8. We have to state that in making this order we are assisted by the Advocate-General, Tamil Nadu as well as counsel for the respondents. Both of them fairly appreciated that the order of the High Court could not be allowed to stand. It is on this basis that we have made this order.

9. As to costs, Mr. Ramamurthi, counsel for the respondents submitted that each party should pay and bear its own costs. The reason given by Mr. Ramamurthi is that his clients are not responsible for the form of the order. The Advocate-General did not press for costs. In that view of the matter we direct the parties to pay and bear their own costs in this appeal.

10. Let the records be forthwith sent to the High Court.

[Note : The judgment under appeal was that of a Bench (Veeraswami, CJ., and Natesan, J) in Appeal No. 81 of 1961, dated 17th September, 1969, after return of finding called from the lower Court,

The Judgment of the Court was delivered by Veeraswami, CJ.]

In our earlier judgment, we called for a finding on two questions: (1) Whether the plaintiff had title to the suit properties and (2) Whether he was in possession thereof. The Subordinate Judge now finds both the points against the plaintiff. The finding was called for because, Mr. Gopalaswami Ayyanagar, for the plaintiff had then represented that he would maintain the declaration granted by the Court below to the plaintiff's full ownership of the plaint-scheduled properties. Though the finding now returned by the Subordinate Judge is against him, Mr. Gopalaswami Ayyangar reports that he would be content if a limited declaration is granted, based on our earlier finding that S.Nos. 2693 and 2694 were part of Lekkom No. 28. The effect of that finding is that the Government would have no title to the two disputed survey numbers and, added to that, is the fact that the Subordinate Judge has also found that the defendant has not been in possession of the survey numbers. The matter is one of complexity and we spent considerable time looking into several documents and plans in order to come to the conclusion that the two survey numbers formed part of Lekkom No. 28.

The finding of the Subordinate Judge as to possession is more or less based on presumption Considering the fact that there is no one before us who disputes the plaintiff's claim to title, it would not be desirable or possible to conclude finally that question in these proceedings. If any third party questions the plaintiff's title, the parties must be left free to fight it out in separate proceedings. On that view of the matter, and also taking into account the present representation of Mr. Gopalaswami Ayyangar that he would be content with a more limited declaration, we think that based on our earlier findings, it would suffice to declare that the defendant is not entitled to the property covered by S.Nos. 2693 and 2694 as forming part of Lekkom No. 28, and as a corollary from it so far as these proceedings are concerned, the plaintiff as against the defendant would be entitled to assert his title to the survey numbers. It follows that the Government should be prevented from interfering with the plaintiff's possession, if any, of the suit properties. But, in the expectation that in view of our finding the State would respect it and not interfere with the plaintiff's possession, if any, of the suit properties, no formal injunction against the defendant need issue. In effect, therefore, the decree of the Court below is modified and, instead of the declaration given by it, there will be a decree that the plaintiff as against the defendant is entitled to the suit properties and to resist interference by the Government. In other respects the appeal is dismissed.

On the view we have taken, the findings of the Subordinate Judge are set at large, and they should not be considered to be final in any future proceeding.

The parties will bear their respective costs in this Court.

R.S. ——— *Case remanded.*

THE SUPREME COURT OF INDIA.

(Civil Appellate Jurisdiction.)

PRESENT :—*A. Alagiriswami, P.K. Goswami and N.L. Untwalia, JJ.*

R. Rangachari .. *Appellant**

v.

S. Suppiah and others .. *Respondents.*

Companies Act (1 of 1956), section 186—Power of Court under—Scope —If can make order regarding the holding and conducting of a meeting already called.

The plain meaning of section 186 of the Companies Act is that the Court may order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit in any one or more of the following contingencies : (*i*) if for any reason it is impracticable to call a meeting of the company other than an annual general meeting; (*ii*) if for any reason it is impracticable to hold the meeting of the company in the manner prescribed by the Act or the Articles : (*iii*) if for any reason it is impracticable to conduct the meeting of the company in the same manner. The use of the word 'and' between the words 'hold' and 'conduct' in clause (*a*) of sub-section (1) clearly shows that the Court has no power to make any order regarding the holding and conducting of any meeting which has already been called without ordering a meeting of the company to be called in place of the meeting already called. The use of the word

* C.A. No. 1136 of 1975. 15th *September*, 1975.

'or' in the first part of sub-section (1) may be disjunctive or conjunctive but undoubtedly the order under clause (*a*) has got to be for all the three purposes and not merely for holding or conducting of the meeting. [*Paras*. 6, 7.]

S. V. Gupte, Senior Advocate, (*Mrs. S. Bhandare*, Advocate of *M/s. Bhandare Parekh* & Co. with him), for Appellant.

S. Govind Swaminathan, Senior Advocate, (*T. Raghavan*, *R. Chandrasekhar* and *K. Jayaram*, Advocates with him), for Respondents Nos. 1 and 2.

C. Bhandare, Senior Advocate, (*A. T. M. Sampath* and *M. M. L. Srivastava*, Advocates with him), for Respondent. No. 3.

The Judgment of the Court was delivered by

Untwalia, J.—The question which falls for our determination in this appeal by special leave is as to what is the meaning and scope of section 186 of the Companies Act, 1956 hereinafter called the Act. For the determination of the said question it will suffice to state only a few facts from the judgment of the Madras High Court. There were two Managing Directors of Century Flour Mills Ltd.,—respondent No. 3. Their names are Shri P. S. Govindaswamy and S. P. Sithambaram. Both of them had been duly appointed as such in the year 1972. They subsequently fell out. In August, 1974 certain shareholders of the company including respondents 1 and 2 lodged a requisition under section 169 of the Act for the calling of an extraordinary general meeting of the company for removal of Govindaswamy. Certain other shareholders lodged a similar requisition for removal of Sithambaram from the post of Managing Director. Both the requisitions were considered by the Board of Directors in their meeting held on 19th August, 1974. As per the requisitions, they called an extraordinary general meeting of the company to be held on 14th September, 1974. The meeting was directed to be held at the residence of one of the shareholders of the company instead of its registered office. The shareholders were divided into two factions belonging to the two groups of the Managing Directors. Apprehending very many difficulties and troubles in the holding and the conduct of the meeting on 14th September, 1974 respondents 1 and 2 filed an application under section 186 of the Act, Company Petition No. 85 of 1974, in the Madras High Court. They prayed to the Court to appoint an Advocate-Commissioner as Chairman of the meeting to be held on 14th September, 1974 so that the proceedings may be conducted in a regular manner. The only respondent impleaded in the said petition was the company which filed a counter-affidavit to resist the prayer of respondents 1 and 2. A learned single Judge of the High Court took the view that power under section 186 of the Act could be exercised even where a meeting had already been called, but it was impracticable to hold or conduct the meeting. In other words, the learned Judge was of the opinion that the Court even without ordering a meeting of the company to be called could appoint a person to be the Chairman of the meeting. But on appreciation of the facts of the case in the light of certain decisions of the High Courts, he came to the conclusion that it was not impracticable to hold or conduct the meeting and hence dismissed the application filed by respondents 1 and 2.

2. O.S. Appeal No. 64 of 1974 was filed in the High Court under clause 15 of the Letters Patent against the order dated 11th September, 1974 of the learned single Judge. By an order made on 12th September, 1974 a Bench of the High Court stayed the convening of the meeting called to be held on 14th September, 1974. It appears that in spite of the service of the order dated 12th September, 1974 on 13th September, the meeting was held on

14th September, 1974. C.M.P. No. 10935 of 1974 was taken out in the form of a Judge's summons under rule 9 of the Company Code Rules, 1959 to declare the meeting held on 14th September, 1974 as void and the resolutions passed therein as illegal and inoperative. The said appeal and the C.M.P. along with other C.M.P.s which are not necessary to be referred to in this judgment were heard by a Bench of the High Court presided over by the learned Chief Justice. The Bench allowed C.M.P. No. 10935 of 1974, put back the parties in the same position as they stood immediately prior to the service of the order dated 12th September, 1974 and declared that the meeting held on 14th September, 1974 and the resolutions passed thereunder would have no effect whatsoever. By a separate judgment, Appeal No. 54 of 1974 was also allowed by the Division Bench. It agreed with the single Judge as regards the meaning and scope of section 186 of the Act but differed from him on the merits of the case. They appointed an Advocate of the Court as the Advocate-Chairman to hold and conduct the meeting and directed that the meeting would take place at the premises of the registered office of the company.

3. The sole appellant in this appeal is a shareholder of the Company. Feeling aggrieved by the orders of the Division Bench of the High Court in C.M.P. No. 10935 of 1974 and in O.S. Appeal No. 64 of 1974 he filed special leave applications in this Court seeking leave to file appeals in both the matters. By order dated 29th August, 1975 a Bench of this Court dismissed as withdrawn S.L.P. No. 1156 of 1975 arising from the judgment and order dated 11th March, 1975 of the High Court in C.M.P. No. 10935 of 1974. Special leave was granted from the judgment and order dated 17th March, 1975 of the High Court passed in O.S. Appeal No. 64 of 1974.

4. Mr. S. V. Gupte, learned counsel for appellant urged the following three points in support of the appeal:

(1) That power under section 186 of the Act could not be exercised until it was found that it was impracticable to call a meeting of the company other than an annual general meeting and to hold and conduct the meeting in the manner prescribed by the Act or the Articles of the company. The Court had no jurisdiction merely to appoint a Chairman of the meeting without an order for the calling of the meeting.

(2) That the High Court was wrong in holding that it was impracticable to hold or conduct the meeting of the company which had already been called.

(3) That during the pendency of the appeal in the High Court, Company Law Amendment Act of 1974 came into force on 1st February, 1975. The powers and jurisdiction of the Court under section 186 stood transferred to the Company Law Board by the said amendment. The Court, therefore had no power to make an order under section 186 on 17th March, 1975.

5. Since in our opinion the first point urged on behalf of the appellant is well-founded and has to be accepted as correct, neither of the other two points need any determination or answer and we express no opinion in respect of them.

6. Section 186 of the Act as it stood at the relevant time reads as follows :-

"*Power of Court to order meeting to be called.*—(1) If for any reason it is impracticable to call a meeting of a company, other than an annual general meeting, in any manner in which meetings of the company may be called, or to hold or conduct the meeting of the company

in the manner prescribed by this Act or the Articles, the Court may, either of its own motion or on the application of any director of the company, or of any member of the company who would be entitled to vote at the meeting—

(*a*) order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit; and

(*b*) give such ancillary or consequential directions as the Court thinks expedient, including directions modifying or supplementing in relation to the calling, holding and conducting of the meeting, the operation of the provisions of this Act and of the company's articles.

Explanation.—The directions that may be given under this sub-section may include a direction that one member of the company present in person or by proxy shall be deemed to constitute a meeting.

(2) Any meeting called, held and conducted in accordance with any such order shall, for all purposes, be deemed to be a meeting of the company duly called, held and conducted."

It corresponds with slight variation to section 79 (3) of the Companies Act, 1913 and section 135 of the English Companies Act, 1948. The plain meaning of section 186 is that the Court may order a meeting of the company to be called, held and conducted in such manner as the Court thinks fit in any or more of the following contingencies.

(*i*) If for any reason it is impracticable to call a meeting of the company other than an annual general meeting.

(*ii*) If for any reason it is impracticable to hold the meeting of the company in the manner prescribed by the Act or the Articles.

(*iii*) If for any reason it is impracticable to conduct the meeting of the company in the same manner.

7. On the occurring of any or more of the said contingencies the Court has to order the calling of a meeting of the company and its holding and conducting in such manner as the Court thinks fit. The use of the word 'and' between the words 'held' and 'conducted' in clause (*a*) of sub-section 1 clearly shows that the Court has no power to make any order regarding the holding and conducting of any meeting which has already been called without ordering a meeting of the company to be called in place of the meeting already called. If an order under clause (*a*) has been made such ancillary or consequential directions as the Court thinks expedient could be given under clause (*b*), including a direction within the meaning of the explanation appended thereto. The language of sub-section (2) further fortifies the above interpretation of sub-section (1) and makes any meeting called, held and conducted in accordance with an order under sub-section (1) to be a meeting of the company duly called, held and conducted. The use of the word 'or' in the first part of sub-section (1) may be disjunctive or conjunctive in the manner we have interpreted above. But undoubtedly the order under clause (*a*) has got to be for all the three purposes and not merely for holding or conducting of the meeting.

8. In Company Petition No. 85 of 1974 no prayer was made to the Court for an order for the calling of a meeting of the company nor has any such order been made by the High Court in appeal. In our opinion, therefore, the application as presented in the Court under section 186 of the Act was not maintainable. No prayer was ever made to the Court for an order that a meeting of the company be called. A fresh application, it goes without saying, if necessary, can be made under section 186 of the Act. But then it will have to be made to the authority mentioned in the amended section.